

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM DANA EDSON,

No. C-01-3128 SBA (EMC)

Plaintiff,

v.

**ORDER RE DEFENDANT’S EX PARTE
MOTION TO COMPEL MEDICAL
PHYSICAL EXAMINATION OF
PLAINTIFF (Docket No. 61)**

LIBERTY MUTUAL INSURANCE
COMPANY, *et al.*,

Defendants.

On September 25, 2002 this Court held a hearing on defendant Liberty Mutual Insurance Company’s (hereinafter referred to as “Defendant”) motion to order the physical examination of plaintiff William Dana Edson (hereinafter referred to as “Plaintiff”) under Federal Rule of Civil Procedure, Rule 35 by Dr. Lorne Eltherington. At the conclusion of the hearing, the Court invited additional briefing, including submission of a proposed stipulation from the Plaintiff limiting the scope of his medical evidence at trial in exchange for obviating the Independent Medical Examination (“IME”). Having received the additional briefing, the Court makes the following determinations.

Plaintiff’s objection to Defendant’s submission of additional evidence along with the supplemental brief is well taken. The Court ordered briefing, not additional evidence. Those evidentiary materials are hereby stricken and disregarded.

On the merits of the motion, the Court determines that the proposed examination constitutes a second physical examination, the first one having been conducted by Dr. Bodor on behalf of Defendant on September 20, 2000, which was prior to the filing of this suit. Although not conducted

1 pursuant to Rule 35, that prior exam means that Defendant must meet a stronger showing of
2 necessity before this Court will order a second examination. *Vopelak v. Williams*, 42 F.R.D. 387,
3 389 (N.D. Ohio 1967).

4 The Court concludes that despite Plaintiff's offer to stipulate that there be no trial testimony
5 that his ongoing disability is due to any material change in his physical condition including his
6 diagnosis not previously in existence before the Bodor exam in 2000, Defendant is still entitled to
7 the proposed exam by Dr. Eltherington. The Court bases its finding of good cause of the following
8 factors.

9 First, in addition to the fact that his current medical condition may be probative to whether he
10 was permanently disabled in 2000 when Defendant denied insurance coverage, as Plaintiff conceded
11 at the hearing, Plaintiff's claim of permanent disability and his current medical condition are directly
12 relevant to his substantive claims and the potential scope of relief. Thus, while Plaintiff may wish to
13 stipulate that there is no material change in condition since 2000, Defendant has an interest in
14 determining whether in fact there has been some change in Plaintiff's condition. As Professors
15 Wright, Miller and Marcus observe, "[I]f permanent injuries are claimed most courts will, on
16 request, allow an additional examination shortly before the trial." Charles Alan Wright, et al., 8A
17 *Fed. Prac. & Proc.* § 2234, p. 475 (2nd ed., 1994).

18 Second, good cause for another medical examination exists when two years has elapsed since
19 the Plaintiff's last examination and where the Plaintiff's condition may have improved since then.
20 *Lewis v. Neighbors Const. Co.*, 49 F.R.D. 308, 309 (W.D. Mo. 1969).

21 Third, although Plaintiff has indicated a willingness to stipulate that there will be no evidence
22 of a material change in his condition since 2000 in order to obviate the examination by Dr.
23 Eltherington, he has not indicated a willingness to preclude all medical testimony regarding
24 observations about and treatment of the Plaintiff by various physicians and health professions since
25 the 2000 exam. Presumably this testimony will be introduced to bolster his claim that Plaintiff was
26 permanently disabled in 2000 and continues to be disabled. This could present a formidable array of
27 witnesses on Plaintiff's behalf at trial. To be sure, Defendant would have Dr. Bodor to testify about
28 Plaintiff's exam two years ago, could cross-examine Plaintiff's medical witnesses, and could have

Dr. Eltherington testify as an expert based on the documents and medical records produced by Plaintiff. However, Dr. Eltherington would not be able to testify on the basis of a current examination of the Plaintiff. Under these circumstances, permitting the IME would provide a level playing field. *Sauer v. Burlington Northern Railroad Co.*, 169 F.R.D. 120, 124 (D. Minn. 1996). As the court noted in *Vopelak, supra*, 42 F.R.D. at 389:

Certainly, the injured party would not expect to go to trial without an up-to-date examination by his own physician. Upon what logic should the opposing party be denied the right to be equally well prepared to present the issue?

Fourth, Dr. Eltherington is board certified in pain management, an area that may be of central importance to Plaintiff's diagnosis. Dr. Bodor, on the other hand, is board certified in physical medicine and rehabilitation. Dr. Eltherington thus provides additional expertise. *See Sauer, supra*, 169 F.R.D. at 124 (significant period of time elapsed since first examination, and re-examination will draw upon expertise of a different but medically appropriate discipline). While Plaintiff contends the IME now sought by Defendant is simply an exercise in expert shopping in response to alleged weaknesses in Dr. Bodor's potential testimony, Plaintiff will, in all likelihood, have ample opportunity to expose those weaknesses pertaining to Defendant's decision to deny coverage in 2000 and Dr. Bodor's role therein, whether or not Dr. Eltherington conducts a current examination. As to Dr. Eltherington's alleged bias given the conclusions reached in his disclosed expert report herein, Dr. Eltherington can be cross-examined at trial in regard thereto.

Accordingly, Defendant's motion to compel a medical examination of the Plaintiff is hereby **GRANTED**. Plaintiff is hereby ordered to submit to an IME (to include a full physical examination, and any and all other tests which are ordinarily done as part of a general physical examination), by Dr. Eltherington within 20 days of this Order at North Santa Rosa Physical Therapy, 2305 Mendocino Avenue, #B, Santa Rosa, California. The exam shall not exceed two hours.

IT IS SO ORDERED.

Dated: October 4, 2002

EDWARD M. CHEN
United States Magistrate Judge